82-1155

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

OTASCO, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

ANDREW M. COATS*
ANN FAFORD
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
Telephone (405) 235-7700

MARTIN B. BERNERT
P. O. Box 885
Tulsa, Oklahoma 74102

JOHN C. WILLIAMS
3101 N.W. Expressway
Oklahoma City, Oklahoma 73112

Attorneys for Petitioner

January 10, 1983

*Counsel of Record

QUESTIONS PRESENTED

When federal judicial proceedings are instituted against a person and his property, can his right to appear in court to defend his property rights be conditioned upon the payment of a fee?

PARTIES

The petitioner is Otasco, Inc. (formerly Oklahoma Tire and Supply, Inc.), an Oklahoma corporation engaged in the selling of a variety of merchandise to the public through a chain of retail stores located throughout Oklahoma and the southern part of the United States.

The respondent is the United States government. The United States government acting through the judicial conference established a fee in bankruptcy court which is imposed upon secured creditors against whom bankruptcy proceedings have been instituted and who desire to take any action with regard to the secured property that is in the debtor's possession.

The United States government was permitted to intervene in the bankruptcy court in two bankruptcy proceedings where Otasco, Inc. was a secured creditor and the debtors were Ronald G. South (BK-80-00317) and Terry Lynn Klingman (BK-80-00507). Both cases have been filed and litigated in the United States District Court for the Western District of Oklahoma. Neither South nor Klingman has appeared, and neither has any interest in these proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Code

AUTHORITIES CONTINUED — PAGE(S)

United States Constitution

Rules of Bankruptcy Procedure

Miscellaneous

Oklahoma Statutes

No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1982

OTASCO, INC.,
Petitioner,
v.
THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, OTASCO, INC., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 14, 1982.

OPINIONS AND ORDERS BELOW

This is a Petition for Certiorari directed to the United States Court of Appeals for the Tenth Circuit and specifically at its opinion written in this case reversing rulings by Judge Luther Eubanks, Chief Judge of the United States District Court for the Western District of Oklahoma and Judge David Kline, Bankruptcy Judge of that court. The Court of Appeals opinion appears at pages 1a through 8a of the Appendix hereto. The opinion of Judge Eubanks

appears at pages 1c through 7c of the Appendix. The opinion of Judge Kline appears at pages 1d through 17d of the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit, which is the subject of this petition, was entered on September 14, 1982. A petition for rehearing was timely filed on September 28, 1982. On October 12, 1982, the United States Court of Appeals for the Tenth Circuit entered its order overruling the petition for rehearing (Appendix, pg. 9a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title II of the Bankruptcy Reform Act of 1979 amended 28 U.S.C. §1930 to read in part:

> "(a) Notwithstanding section 1915 of this title, *the parties commencing a case under title 11* shall pay to the clerk of the bankruptcy court the following filing fees:
>
> (1) For a case commenced under chapter 7 or 13 of title 11, $60.[5]
>
> (b) *The Judicial Conference* of the United States *may prescribe additional fees* in cases under title 11 *of the same kind* as the Judicial Conference prescribes under section 1914(b) of this title.
>
> (e) The clerk of the bankruptcy court may collect only the fees prescribed under this section." (emphasis added)

Effective October 1, 1978, 28 U.S.C. §1914 was amended, increasing the district court $15.00 filing fee requirement as follows:

> "(a) The clerk of each district court shall require the *parties instituting any civil action, suit* or *proceeding* in such court, whether by *original process, removal* or *otherwise, to pay a filing fee of $60,* except that on application for a writ of habeas corpus the filing fee shall be $5.
>
> (b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States. . . ." (emphasis added)

Other relevant statutes dealing with the rights of secured creditors under the Bankruptcy Act are cited and quoted in pertinent part, *infra.*

STATEMENT OF THE CASE

Chronologically, the events leading to this appeal may be divided into two categories: those occurring before the Debtors' bankruptcy cases were filed, and those which occurred thereafter.

1. PRE-BANKRUPTCY EVENTS

Otasco sells a variety of merchandise to the public through a chain of retail stores, and as a creditor is involved in some 800 to 1000 bankruptcy cases annually. The amounts of indebtedness, usually secured, average about $300.00.[1]

---

[1] Comparison of Bankruptcy Account Charge Offs (See Appendix G).

During 1979 and 1980, Otasco sold goods to the Debtors.[2] The sales by Otasco to the Debtors were on credit, with the Debtors agreeing to pay Otasco the purchase prices in installments, and with the Debtors agreeing that the goods purchased would, as collateral, secure their purchase money indebtedness to Otasco.[3]

The Debtors each defaulted under their agreements with Otasco by failing to pay installments of their purchase money debts as agreed. Under the express terms of the Debtors' respective agreements with Otasco, and under applicable law, upon the Debtors' breach of the security agreement, Otasco had the following two basic rights:

---

[2] Goods sold to Ronald Gene South included one .38 caliber special pistol and shells, for $95.10, and two tires, for $161.34. *See* Complaint and Objection to Dischargeability of Indebtedness (Record Vol. I, pg. 30). Terry Lynn Klingman purchased an air conditioner for $464.88, and four tires for $348.38. *See* Complaint and Objection to Discharge (Record Vol. II, pg. 143).

[3] *See* Exhibits to Complaint and Objection to Dischargeability of Indebtedness (Record Vol. I, pg. 30) and to Complaint and Objection to Discharge (Record Vol. II, pg. 143). Under the Bankruptcy Code, the Debtors created a "security interest", *i.e.*, a "lien created by agreement" in favor of Otasco with respect to the goods sold. 11 U.S.C. §101(37); *See also* 12A Okla. Stat. 1971, §1-201(37), which defines, in pertinent part, the term "security interest" to mean "an interest in personal property . . . which secures payment or performance of an obligation." The Bankruptcy Code further defines the term "lien" to be a "charge against or interest in property to secure payment of a debt or performance of an obligation . . ." 11 U.S.C. §101(28). Also of significance definitionally, the term "collateral" means "the property subject to a security interest . . ." 12A Okla. Stat. 1971, §9-105(1)(c). As is apparent by these definitions, Otasco retained a property interest in the goods sold to assure payment of the Debtors' respective obligations to pay the purchase prices therefor.

a. First, immediately to be paid in full *all* monies owed by the Debtors;[4] and,

b. Second, immediately to take possession of its collateral.[5]

Before the Debtors commenced their voluntary bankruptcy cases, Otasco had filed suits in the District Court of Oklahoma County seeking enforcement of these rights.[6]

But for the intervention of the Debtors' voluntary bankruptcy cases, the rights of Otasco to immediate payment from the Debtors and to immediate possession of its

---

[4] By statute, when a debtor defaults under an agreement which creates a security interest (a "security agreement") 12A Okla. Stat. 1971, §9-105 (1)(h), the secured party (the person in whose favor the security interest exists, Otasco in this case (12A Okla. Stat. 9-105(1)(i)), "has the rights and remedies provided in [Part 5 of Article 9 of the Uniform Commercial Code, 12A Okla. Stat. 1971, §9-501, *et seq.*] and, except with respect to limitations not here applicable, those provided in the security agreement." 12A Okla. Stat. 9-501(1). Among the rights provided in the agreements between the Debtors and Otasco was Otasco's right to be paid immediately and in full all monies owed by the Debtors upon their default. *See* Exhibits to Complaint and Objection to Dischargeability of Indebtedness (Record Vol. I, pg. 30) and to Complaint and Objection to Discharge (Record Vol. II, pg. 143).

[5] Upon default by the Debtors, Otasco's right to immediate possession of its collateral arose by agreement (*See* Exhibits to Complaint and Objection to Dischargeability of Indebtedness, *id.*, and to Complaint and Objection to Discharge, *id.*), as well as a matter of express statutory right. 12 Okla. Stat. 1971, §9-503.

[6] Kline Opinion at page 5d of Appendix. *See* Complaint and Objection to Dischargeability of Indebtedness (Record Vol. I, pg. 30), and Complaint and Objection to Discharge (Record Vol. II, pg. 143).

collateral would have been enforced, and Otasco's interests protected, in the State Court cases.[7]

2. POST-BANKRUPTCY EVENTS

The Debtors each filed voluntary petitions[8] with the Bankruptcy Court seeking relief under chapter 7 of the Bankruptcy Code.[9] Both Debtors retained possession and continued to use Otasco's collateral.[10] Because of the type of goods comprising Otasco's collateral, *i.e.*, tires, an air

---

[7] In the cases filed in State Court, Otasco sought, in addition to money judgment against the Debtors, *immediate* possession of its collateral pursuant to Oklahoma's replevin statutes (12 Okla. Stat. 1971, §1571, *et seq.*, as amended). Under 12 Okla. Stat. Supp. 1980, §1571A.3, Otasco was entitled to possession of its collateral *pre-judgment*, after posting an appropriate bond, possibly as soon as five days after service of process upon the Debtors.

[8] Voluntary Case Debtor's Petition (Record Vol. I, pg. 1); Voluntary Petition (Record Vol. II, pg. 114).

[9] 11 U.S.C. §701, *et seq.*, entitled "Liquidation".

[10] On the Schedules accompanying the voluntary bankruptcy petitions, the Debtors listed certain items of Otasco's collateral as "exempt" property. Voluntary Case Debtor's Petition, Schedule B-4 (Record Vol. I, pg. 11); Voluntary Petition, Schedule B-4 (Record Vol. II, pg. 125). (Apparently, certain items of Otasco's collateral may have been disposed of by the Debtors prior to bankruptcy. Otasco was, however, stayed from even telephoning the Debtors to inquire as to such collateral's whereabouts. *See* text at 13 *infra.*) If no objection is filed to the debtor's claim of exempt property, the property is excluded from administration in the bankruptcy case as "property of the *estate*". 11 U.S.C. §522. It is thereafter classified as "property of the *debtor*". Since the duties of the trustee are directed only toward property of the estate, the debtor never relinquishes possession nor control over the property. Consequently, the property does not become subject to the duties of the trustee to preserve, account for and liquidate. 11 U.S.C. §704.

conditioner, etc.,[11] which through use, model changes and the like, rapidly depreciate in value, the Debtors' retention of possession and continued use was necessarily a critical concern to Otasco.

Following the filing of the Debtors' voluntary petitions, the Bankruptcy Court entered orders and issued notices in each of the Debtor's cases substantially affecting Otasco's rights described above which had accrued upon the Debtors' defaults.[12]

The Discharge Orders and Stay Notices specifically altered the above-described rights of Otasco which arose upon the Debtors' defaults. First, with respect to Otasco's right to payment, the Discharge Orders and Stay Notices provided:

> "If no objection to the discharge of the debtor is filed on or before the last day fixed therefor [usually 30 days after the first date set for the first meeting of creditors, as provided by Rule 404, Rules of Bankruptcy Procedure], the debtor will be granted his discharge. If no complaint to determine the dischargeability of a debt under clause (2), (4) or (6) of 11

---

11 *See* note 12, *supra.*

12 Order for Meeting of Creditors and Fixing Times for Filing Objections to Discharge and for Filing Complaints to Determine Dischargeability of Certain Debts, Combined with Notice Thereof and of Automatic Stay (South case — Record Vol. I, pgs. 12, 13; Klingman case — Record Vol. II, pgs. 124, 125). Such orders and notice (collectively "the Discharge Orders and Stay Notices") were in the form given in all bankruptcy cases by the Bankruptcy Court, designated Official Form No. 13, in accordance with the Bankruptcy Court's Local Rule 1 adopting the Suggested Interim Rules of Bankruptcy Procedure. Copies of the Discharge Orders and Stay Notices (Attachments "3" and "4") are attached hereto as Appendix E and Appendix F, respectively.

> U.S.C. §523(a) is filed within the time fixed therefor as stated in subparagraph 4 above, the debt may be discharged."[13]

Second, with respect to Otasco's right to immediate possession of its collateral, the Discharge Orders and Stay Notices stated:

> "As a result of the filing of the petition, certain acts and proceedings against the debtor and the property of the debtor are stayed as provided in 11 U.S.C. §362(a)."[14]

The impact of the quoted provisions of the Discharge Orders and Stay Notices, as imposed upon the rights of Otasco, may best be analyzed in terms of the "discharge", and then the "automatic stay".

a. Discharge: 11 U.S.C. §§523(a), 524, 727(a)

The effect of a bankruptcy discharge of a creditor's claim is defined in Section 524 of the Bankruptcy Code (11 U.S.C. §524), which provides in pertinent part as follows:

> "(a) a discharge [in a bankruptcy case] —
>
> * * *
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment

---

[13] *Id.* Under Rule 404, Rules of Bankruptcy Procedure, as amended by suggested Interim Bankruptcy Rule 4002, the bankruptcy court sets a deadline for filing complaints *objecting* to the debtor's discharge. Under Rule 409, Rules of Bankruptcy Procedure, as amended by suggested Interim Bankruptcy Rule 4003, the bankruptcy court also sets a deadline for filing complaints contending that a particular debt is *excepted* from discharge.

[14] *Id.*

> of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not a discharge of such debt is waived; and
>
> (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect or recover from, or offset against, property of the debtor. . . ."

The legislative history amplifies Congress's intent:

> "The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a *total prohibition on debt collection efforts.*
>
> * * *
>
> In effect, the discharge *extinguishes the debt.* . . ." House Report No. 95-595, 95th Cong., 1st Sess. 365-6 (1977); Senate Report No. 95-989, 95th Cong., 2nd Sess. 80 (1978). (emphasis added)

A discharge, thus, *permanently enjoins* the commencement or continuation of an action, the employment of process, or the taking of *any act whatsoever,* to collect any debt as a personal liability of the debtor. Unless a creditor takes action to prevent it, the entire debt will be discharged as a personal obligation of the debtor.

There are two ways a creditor may challenge the debtor's discharge. In both, the prescribed procedure is by "adversary proceeding" in the bankruptcy court, commenced by filing a "complaint."[15] First, the creditor may

---

[15] Rule 701, Rules of Bankruptcy Procedure, identifies as an adversary proceeding "any proceeding instituted by a party before a bankruptcy judge to . . . (4) object to . . . a discharge . . . (6) obtain relief from

file a complaint *objecting* to the debtor's discharge *in toto*.[16] Second, the creditor may file a complaint seeking to *except* that creditor's claim from the debtor's discharge.[17]

b. The Automatic Stay: 11 U.S.C. §362

When a bankruptcy petition is filed, the right of a secured creditor to proceed against the defaulting debtor or against property of the debtor is automatically stayed. 11 U.S.C. §362. In pertinent part, 11 U.S.C. §362(a) provides:

> "[The filing of a bankruptcy petition] operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, ad-

---

[15] (Continued)

a stay . . . or (7) determine the dischargeability of a debt." Rule 703, Rules of Bankruptcy Procedure, provides that "an adversary proceeding is commenced by filing a complaint with the court." Such Rules are applicable to the present cases in accordance with Section 405(d), Bankruptcy Reform Act of 1978, Pub. L. 95-598.

[16] U.S.C. §727(a) provides grounds upon which a bankruptcy court may deny a discharge *in toto*. Subsection 727(c)(1) permits a creditor to object to discharge on a subsection (a) ground. The Discharge Orders and Stay Notices fixed a time limitation on Otasco's right to file such objection in accordance with Rule 404(a), Rules of Bankruptcy Procedure (applicable to the present cases in accordance with Section 405(d), Bankruptcy Reform Act of 1978, Pub. L. 95-598).

[17] In contrast to the objection to discharge *in toto*, note 26, *supra*, 11 U.S.C. §523(a) provides grounds upon which an individual creditor may have its debt excepted from the debtor's discharge. Subsection 523(c) requires creditors to request, by complaint, note 25, *supra*, that their individual debt be excepted from the debtor's discharge. The Discharge Orders and Stay Notices fixed a time limitation on creditors such as Otasco

> ministrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy case], or to recover a claim against the debtor that arose before the commencement of the [bankruptcy case];
>
> * * *
>
> (5) any act to create, perfect or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the [bankruptcy case];
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy case] . . ."

The "any act" language of Section 362(a)(6) precluded Otasco from even telephoning the Debtors to ascertain the whereabouts, condition, etc., of its collateral, unless and until Otasco sought relief in the Bankruptcy Court and the Bankruptcy Court terminated, annulled or modified the automatic stay order.

The prescribed procedure for seeking relief from the automatic stay is by adversary proceeding in the bankruptcy court commenced by filing a complaint.[18] The automatic stay restricts all remedies, legal and equitable, exclusively to the jurisdiction of the bankruptcy court. There is no other forum. The filing by the Debtors of voluntary

---

[17] (Continued)

within which they could file complaints of this type, in accordance with Rule 404(a), Rules of Bankruptcy Procedure (applicable to the present cases in accordance with Section 405(d) of the Bankruptcy Reform Act of 1978, Pub. L. 95-598).

[18] Rules 701 and 703, Rules of Bankruptcy Procedure, *see* note 25, *supra.*

petitions in the Bankruptcy Court stayed Otasco's cases filed in State Court, and precluded Otasco from exercising either its immediate right to payment or to possession of its collateral.

Thus, to avoid the discharge of the Debtors' purchase money debts, the Discharge Orders and Stay Notices *required* Otasco to file complaints in the Bankruptcy Court. Likewise, if possession of its collateral was to be obtained, the Discharge Orders and Stay Notices *required* Otasco to file complaints in the Bankruptcy Court. The requirement that Otasco take action in the Bankruptcy Court to either be paid (avoid discharge) or to obtain possession of its collateral (relief from the stay) is in accord with the broad, *exclusive* jurisdictional grant to the Bankruptcy Court in respect of matters pertaining to the Debtors and their property.[19]

---

[19] 28 U.S.C. §1471 (applicable to the present cases in accordance with Section 405(c)(2) of the Bankruptcy Reform Act of 1978, Pub. L. 95-598), entitled "Jurisdiction", provides in pertinent part:

> "(a) [The bankruptcy courts] shall have *original and exclusive* jurisdiction of all [bankruptcy cases].
>
> (b) [The bankruptcy courts] shall have original but not exclusive jurisdiction of all civil proceedings arising under [bankruptcy cases] or arising in or relating to [bankruptcy cases].
>
> • • • •
>
> (e) The bankruptcy court in which a [bankruptcy case] is commenced shall have *exclusive jurisdiction* of all of the property, wherever located, of the debtor, as of the commencement of such case." (emphasis added)

Thus, a bankruptcy petition grants the bankruptcy courts essentially exclusive jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases. Otasco was forced into the bankruptcy forum by the Debtors. Otasco did not voluntarily seek access to the Bankruptcy Court, yet was required to recognize its exclusive jurisdiction.

Faced with the certain loss of both its right to immediate payment in full, and its right to immediate possession of its collateral, Otasco pursued its only course of action in the only available forum. Otasco filed complaints in the Bankruptcy Court seeking non-dischargeability determinations and relief from the stay.[20] As a prerequisite to the filing of such complaints, the clerk of the Bankruptcy Court was required to charge Otasco a $60.00 filing fee with respect to each complaint.[21]

REASONS FOR GRANTING THE WRIT

There are a number of reasons why this Court should grant the requested writ. They are as follows:

1. This is a case of enormous commercial significance. Secured creditors all across the country are being forced to pay the fee in question in literally thousands of cases each year in order to defend their property rights guaranteed by law. As an example of the negative economic impact suffered by retail merchants such as Otasco, a comparison of bankruptcy account charge-offs appears in the Appendix at pages 1g through 3g. This chart reflects the numbers of bankruptcies in which Otasco has been involved and in

---

[20] Complaint and Objection to Dischargeability of Indebtedness (Record Vol. I, pg. 30); Complaint and Objection to Discharge (Record Vol. II, pg. 143).

[21] In accordance with objections raised by Otasco to the filing and pursuant to its Application by Plaintiff to Place Filing Fee in Escrow filed in each case (Record Vol. II, pg. 147; Record, Vol. II, pg. 182), filing fees of Otasco were placed with the Court Clerk "in escrow" pending a determination of this appeal.

which they would have to pay the subject bankruptcy fee if they are to protect their property.

2. While petitioners have not discovered any other decision by a United States Court of Appeals dealing with this precise question, there are a number of United States District Court decisions and bankruptcy court decisions which are in conflict. In its reply brief in the court below, the government cited a number of decisions dealing with this question such as *Purdy* v. *United States*, 10 B.R. 901 (N.D.Ga. 1981), *aff'd* No. C81-129 R (N.D.Ga. 1981), *In re Bradford*, 8 B.C.D. (CRR) 263 (E.D.Ill. 1981) and *In re Leyba*, 7 B.C.D. (CRR) 1111 (Colo. 1981). Further, as stated by the government in its original brief in the circuit court:

> "[2] About 25 cases have been filed challenging the $60.00 filing fee. Decisions in many of the cases have been stayed pending the outcome of this appeal. At least two of these cases have been brought in the Tenth Circuit. In *Fidelity Financial Services, Inc.* v. *Sophia Leyba*, No. 81 M 1080 (July 15, 1981), the Bankruptcy Court for the District of Colorado expressly rejected the reasoning of the bankruptcy and district courts in this case and upheld the $60 fee. No appeal was taken by the creditor. In *In re Wright*, B.R. No. 81-0092 P, Adv. Pro. No. 81-0196 (July 27, 1981), the Bankruptcy Court for the District of New Mexico invalidated the fee, relying largely on the analysis in this case. The government has appealed the decision to the district court and moved to stay those proceedings pending the outcome of this appeal."

3. Conditioning the right to defend one's property rights upon the payment of a fee is constitutionally im-

permissible under established concepts of due process of law and is inconsistent with decisions of this Court.

Under the provisions of the Fifth Amendment to the Constitution of the United States no one may be "deprived of life, liberty or property without due process of law." The very essence of due process of law is free access to the courts to defend these rights. No fee may be charged as a condition precedent to the right of a person to defend his life, liberty or property.

No one would seriously contend that a defendant in a criminal case, be he rich or poor, could be required to pay a fee before appearing in court to answer the allegations against him. Under our laws property rights must be similarly protected. The government may not impose a fee or tax as a prerequisite to the right to defend. [*See Burns* v. *Ohio*, 360 U.S. 252 (1959) and *Smith* v. *Bennett*, 365 U.S. 708 (1961), holding the imposition of a fee as a precondition for filing of appeals or habeas corpus proceedings where personal liberty is involved, a violation of due process of law.]

This novel question now before the Court has never been directly addressed by this Court. However, in two relatively recent decisions by this Court, *dicta* appearing in the majority, concurring, and dissenting opinions, strongly indicate that the right to defend cannot be conditioned upon the payment of a fee.

The first case is *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). In this case the United States Supreme Court held that a state court filing fee required of indigent persons seeking a divorce was violative of due process of law.

The Court, commenting on the judicially established requirement that persons forced to defend themselves or their property in court must be given a meaningful opportunity to be heard, stated:

> "Early in our jurisprudence, this Court voiced the doctrine that *'(w)herever one is assailed in his person or his property, there he may defend,'* * * * citations of authority * * *. The theme that 'due process of law signifies a right to be heard in one's defence,' *Hovey* v. *Elliott,* supra, at 417, 42 L Ed at 221, has continually recurred in the years since *Baldwin, Windsor,* and *Hovey.* Although '(m)any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in *Mullane* v. *Central Hanover Tr. Co.,* 339 U.S. 306, 94 L.Ed. 865, 70 S Ct 652 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" 401 U.S. at 377-78, 28 L.Ed.2d at 118. (emphasis added)

The question for determination in *Boddie, supra,* was whether indigent persons would have access to the court system as plaintiffs. But in discussing the indigency aspect of the case and clearly negating its importance, the majority opinion reflected the Court's concern about a defendant's right to defend his person or property regardless of ability to pay. The Court stated:

> "But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For *at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a de-*

> *fendant's full access to that process raises grave problems for its legitimacy.*" 401 U.S. at 376, 28 L.Ed.2d at 117. (emphasis added)

As previously demonstrated herein, the filing of complaints in the Bankruptcy Court was the only effective means for Otasco to obtain relief — the Bankruptcy Court had exclusive jurisdiction as to both the discharge and stay of Otasco's rights;[22] and, Otasco had no effective alternative to filing its complaint.[23]

Shortly after the *Boddie* decision, *supra*, the United States Supreme Court decided the case of *United States* v. *Kras*, 409 U.S. 434 (1973). That case dealt with the question of whether an indigent person could be required to pay a fee before he could avail himself of the federal bankruptcy law. The Court held that the case was distinguishable from *Boddie, supra*, because bankruptcy is not the only available relief for debtors and there is no constitutional right to obtain a discharge of one's debts in bankruptcy.

Stated differently, *Boddie* held that denying an indigent access to the divorce courts because of a filing fee requirement was constitutionally unsupportable, divorce in state court being the sole and exclusive method of disolving a marriage relationship. On the other hand, the Court in *Kras, supra*, held that there were other means by which a party could rearrange his financial burdens without resort to the bankruptcy courts and that, therefore, charging a fee before one could have access to bankruptcy was not constitutionally prohibited.

---

22 *See* text at 10-16, *supra*.

23 *See* Proposition III, text at 29-41, *infra*.

It is critical to note that in the case at bar we are not dealing with the question of whether access to the bankruptcy courts is available in the first instance. Rather, we are concerned with the constitutional propriety of imposing a fee as a precondition to the right to defend one's property interests in the sole and exclusive forum in which he may do so. Once the provisions of the bankruptcy law have been invoked, bankruptcy court becomes the sole and exclusive forum in which the claims to the debtor's property can be asserted and in which creditors can protect their security interests. 28 U.S.C. §1471(e) and 11 U.S.C. §362.

It is this element of exclusivity which is the primary distinction between *Boddie* and *Kras*. Exclusivity is present in the case at bar because the bankruptcy court has become the exclusive forum in which Otasco may protect its property interests. This distinction is clearly indicated in the majority opinion in *Kras*. The Court, referring to *Boddie, supra,* states:

> "In the light of all this, we concluded that resort to the judicial process was '*no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court*' and we resolved the case 'in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.'" 409 U.S. at 444, 34 L.Ed.2d at 635. (emphasis added)

The quoted language is equally applicable to the case at bar.

Here Otasco is called upon to defend its interests in court and is entitled to do so without the payment of fees.[24] A study of the federal fee system reveals that this is the *only instance* under federal law where a fee must be paid by a person against whom proceedings have been instituted.

In the court below, the government suggested that the bankruptcy system should be paid for by those who use it. Otasco has no quarrel with that statement. Here Otasco did not voluntarily file a petition in bankruptcy. As pointed out by Judge Kline:

> "It is constitutionally suspect to urge that the bankruptcy system should be paid for by those *against whom it is used.*" Kline Opinion at 11. (emphasis added)

---

[24] Otasco does not challenge the $60 filing fee for all adversary complaints in the bankruptcy court. Under the new Bankruptcy Reform Act of 1978 (Pub. L. 95-598), the expanded jurisdiction of the bankruptcy court allows it to hear many civil proceedings which might otherwise be heard in district court. Otasco objects *only* to the filing fee for three specific types of complaint: (1) to obtain relief from the automatic stay; (2) to determine dischargeability of particular debts; and (3) to generally object to discharge. No objection is made by Otasco to the other types of complaints which, under the Bankruptcy Reform Act of 1978, may now be filed in a bankruptcy court in accordance with Rule 7001, Interim Rules of Bankruptcy Procedures, which now includes within the definition of "adversary proceeding" any "proceeding before a bankruptcy judge for legal, equitable, or declaratory relief which arises under non-bankruptcy law." Otasco's objection is limited to the three *bankruptcy law* types of adversary proceedings listed above. The opinions of the Bankruptcy Court and the District Court are likewise limited. Kline Opinion at 13; Eubanks Opinion at 1-2.

CONCLUSION

For the foregoing reasons, petitioner, Otasco, Inc., respectfully submits that this Court should grant this Petition for Writ of Certiorari.

ANDREW M. COATS*
ANN FAFORD
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
Telephone (405) 235-7700

MARTIN B. BERNERT
P. O. Box 885
Tulsa, Oklahoma 74102

JOHN C. WILLIAMS
3101 N.W. Expressway
Oklahoma City, Oklahoma 73112

Attorneys for Petitioner

January 10, 1983

APPENDIX A

PUBLISH

[Filed Sept. 14, 1982]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN RE RONALD GENE SOUTH, Debtor,	)	
OTASCO, INC., Plaintiff-Appellee,	)	No. 81-1750
v.	)	
UNITED STATES, Defendant-Appellant.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. CIV-80-1358-E)

John C. Hoyle, Attorney, (J. Paul McGrath, Assistant Attorney General, David L. Russell, United States Attorney, William Kanter and Bruce N. Bagni, Attorneys, on the brief) Department of Justice, Washington, D. C., for Defendant-Appellant.

Andrew Coats (G. Blaine Schwabe, III, and Ann L. Faford, also of Crowe & Dunlevy; and John C. Williams with him on the brief) Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before McWILLIAMS, LOGAN, and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

[APPENDIX]

The only issue in this appeal is the constitutionality of the requirement adopted by the Judicial Conference of the United States, pursuant to 28 U.S.C. § 1930(b), that creditors who initiate adversary bankruptcy proceedings pay a $60 filing fee.[1]

Otasco, Inc. operates a retail store in Oklahoma City, through which it sold automobile tires and other personal property to Ronald Gene South and Terry Lynn Klingman. The sales were made on credit, and Otasco retained a security interest in the goods. Subsequently, South and Klingman separately defaulted on their indebtedness, and Otasco instituted legal proceedings in state court for personal judgments against the debtors and repossession of the goods.

During the pendency of the state proceedings South and Klingman each filed voluntary petitions in bankruptcy naming Otasco as a creditor. Pursuant to section 362 of the Bankruptcy Code, 11 U.S.C. § 362, Otasco's state court proceedings were automatically stayed. By routine orders the bankruptcy court set dates by which objections to the discharges of indebtedness were to be filed, stating that if no objections were filed the debts owed Otasco by South and Klingman would be discharged. Otasco filed pleadings seeking relief from the automatic stay and objecting to the discharges. In connection with its pleading in each bankruptcy proceeding Otasco was required to pay a $60 filing fee. Otasco filed a motion asserting that the filing fee requirement was unconstitutional. After permitting the United States to intervene, the bankruptcy court held that the fee requirement violated the Due Process Clause of the Fifth Amendment. *Otasco, Inc.* v. *United States (In*

---

[1] In addition to holding the fee unconstitutional, the trial court found that when the Judicial Conference established the fee it exceeded its authority under 28 U.S.C. § 1930(b). *Otasco, Inc.* v. *United States (In re South)*, 10 Bankr. 889 (W.D.Okla.1981). However, on appeal Otasco has conceded the statutory authority for the fee and has limited its arguments to the constitutional issue.

re South), 6 Bankr. 645 (Bankr. W.D. Okla. 1980). On appeal the district court affirmed, deeming the creditor to be in the position of a defendant.

> "The court can but note as emphasized by [Otasco] that a 'study of the federal fee system reveals that this is the *only instance* under federal law where a fee must be paid by a person against whom proceedings have been instituted.' No fee is properly chargeable as a condition precedent to a person's right to *defend* life, liberty or property in a *forum* having *sole, exclusive jurisdiction.*"

Otasco, Inc. v. *United States (In re South)*, 10 Bankr. 889, 892 (W.D. Okla. 1981). The United States appeals and argues that the bankruptcy and district courts erred in concluding that the fee requirement is unconstitutional. We agree with the government, and, therefore, we reverse.[2]

Otasco's assertion that the fee requirement violates due process is founded on the theory that creditors of bankrupts are in a defensive posture and the imposition of a filing fee unconstitutionally burdens the creditors' access to the courts to defend their property rights. Otasco relies heavily upon *Boddie* v. *Connecticut*, 401 U.S. 371 (1973).

In *Boddie*, the Court held that indigent persons seeking to litigate fundamental rights could not be denied access to court solely because of their inability to pay the filing fee. The Court reasoned that because divorce court was the only available legal means of dissolving marriage, "[r]esort to the judicial process by these plaintiffs is no

---

[2] We considered whether this case is moot, since *Northern Pipeline Constr. Co.* v. *Marathon Pipeline Co.*, ... U.S. ....., 50 U.S.L.W. 4892 (June 28, 1982), declared portions of the Bankruptcy Code to be unconstitutional. However, the Supreme Court stayed its judgment until October 4, 1982, leaving controversies like this one to be resolved during the interim. Further, the fee at issue was not promulgated under the Bankruptcy Code but pursuant to authority vested in the Judicial Conference of the United States by 28 U.S.C. § 1930(b).

more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court," 401 U.S. at 376-77, and that "denial of a defendant's full access to that process raises grave problems for its legitimacy." *Id.* at 376.

Otasco argues that, like the *Boddie* appellants, it is essentially a defendant and that conditioning its access to court upon the payment of a filing fee violates the Due Process Clause. The government contests Otasco's posture as a defendant, arguing that Otasco may file a proof of claim without paying a fee; if objection to the claim is made the creditor's rights are adjudicated without fee, and if no objection is made the creditor's lien survives unaffected by the bankruptcy. *See* 11 U.S.C. §§ 501-502.[3] Otasco makes various counterarguments, based principally upon the debtor's possession of the goods as exempt property and upon the fact that the value of the assets are constantly declining due to obsolescence and their use by the debtor. We do not resolve whether Otasco may properly be characterized as a defendant, because even if Otasco is a defendant it does not follow that due process requires access to bankruptcy proceedings to be free from the burden of a fee requirement.

The Supreme Court has upheld, in the face of due process challenges, various statutory burdens on a defendant's access to court. In *Ortwein* v. *Schwab*, 410 U.S. 656 (1973), the Court held that a state could require indigent welfare recipients to pay filing fees to obtain access to the courts for judicial review of agency determinations reduc-

---

[3] The government also points out that without payment of a fee Otasco could seek protection of its interest in the collateral under 11 U.S.C. § 363(e), request sale by the trustee under sections 363(f) or 725, or, if the value of the creditor's claim exceeds the value of the property (the bankrupt has no equity), Otasco could ask that the property be abandoned under section 554. However, these procedures are not available to Otasco because its interests are in exempt assets not within the control of the trustee.

ing their welfare benefits. Similarly, the Court affirmed a decision by a three-judge district court that held constitutional a Louisiana requirement that defendants in a foreclosure action post security prior to resisting foreclosure. *Ross* v. *Brown Title Corp.*, 356 F.Supp. 595 (E.D. La.), *aff'd mem.* 412 U.S. 934 (1973). The Court in *Boddie* did not hold that a defendant's access to court can never be burdened. Rather, the Court utilized a balancing test and held that Connecticut's denial of access was unconstitutional because of "the absence of a sufficient countervailing justification for the State's action." 401 U.S. at 380-81. In this and other contexts courts balance the interests of the state against the interests of individuals to determine whether the strictures of due process are satisfied. *See Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976); *Goldberg* v. *Kelly*, 397 U.S. 254, 262-66 (1970); *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961); *In re Green*, 669 F.2d 779 (D.C. Cir. 1981).[4] The constitutionality of the filing fee, then, turns on whether the fee "unduly" burdens Otasco's access to the judicial process, which in turn is determined by balancing the interest Otasco seeks to assert in court against the government's interest in exacting the fee.

Otasco is seeking to preserve its contractual rights of immediate possession, immediate payment in full, and per-

---

[4] In *Green*, considering a prisoner's petitions to a court, the D.C. Circuit said,

> "That right of access to the courts, however, is neither absolute nor unconditional.
>
> • • •
>
> Apart from the necessity of a case-by-case determination of poverty, frivolity or maliciousness, a court may impose conditions upon a litigant — even onerous conditions — so long as they assist the court in making such determinations, and so long as they are, taken together, not so burdensome as to deny the litigant meaningful access to the courts."

669 F.2d at 785, 786.

sonal recourse against the debtor. None of these rights touch on fundamental interests. Otasco's contractual rights — economic interests — have "far less constitutional significance than the interest of the *Boddie* appellants." *Ortwein* v. *Schwab*, 410 U.S. at 659. *See also United States* v. *Kras*, 409 U.S. 434, 446 (1973) ("[B]ankruptcy legislation is in the area of economics and social welfare. . . . [T]he applicable standard, in measuring the propriety of Congress' classification, is that of rational justification."). The government has at least two identifiable interests in imposing the fee requirement: First, through the fee Congress hopes to recoup some of the costs of the bankruptcy system. Second, the fee may serve to discourage creditors from initiating adversary proceedings in order to exact reaffirmation agreements; the fee ensures, to some minimal degree, that creditors are genuinely contesting discharge rather than seeking to harass the debtor. In the face of Otasco's ability to pay the fee, the nonfundamental nature of Otasco's interest, and the government's legitimate interest in levying the fee, we cannot say that the fee requirement unduly burdens Otasco's access to the judicial process.

Other considerations buttress the conclusion that the fee is not an undue burden. First, were Otasco to seek enforcement of its contract rights in state court, it would be required to pay a filing fee. No one could reasonably contend that the state fee is unconstitutionally burdensome. That the bankruptcy fee is accompanied by a shortened limitations period and a suspension of nonjudicial remedies does not, in our view, render it more burdensome than the state fee.[5] Further, without violating due process, Con-

[5] The bankruptcy court orders had the effect of shortening the limitations period on the defaulted indebtedness. However, that a forum applies its own statute of limitations rather than the limitations period of the forum giving rise to the cause of action does not violate due process. *See Allstate Insurance Co.* v. *Hague*, 449 U.S. 302 (1981); *Home Insurance Co.* v. *Dick*, 281 U.S. 397 (1930).

gress could have chosen not to provide procedures for creditors to seek relief from the automatic stay or contest discharge. That Congress instead chose to condition access to such procedures upon the payment of filing fees does not offend the Constitution.

Otasco also argues that because the value of its interest relative to the filing fee renders litigation economically impractical, the fee requirement denies Otasco an opportunity to be heard. This is only admitting that its interest may not be worth the cost of litigation, a question litigants face in almost every lawsuit, particularly considering the American rule that attorney's fees are not ordinarily recoverable even though the suit is won. *See Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *Boddie* did not establish a right to be heard, without payment of fees, in all cases.

> "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship."

401 U.S. at 382-83. Here, no fundamental interest is burdened by the filing fee, and, since the government has a legitimate interest in requiring it, the fee does not violate due process.

Otasco's last argument is that because it must pay the filing fee before being heard, exacting the fee itself is a taking of property without due process. Such an argument could be made against every governmental tax levy. The assertion that uniformly applicable fees and taxes cannot be imposed without an opportunity to be heard was laid to rest nearly seventy years ago by the Supreme

Court, speaking through Justice Holmes, and we need not exhume it here:

> "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."

Bi-Metallic Investment Co. v. *State Board of Equilization*, 239 U.S. 441, 445 (1915).

REVERSED AND REMANDED.

SEPTEMBER TERM — October 12, 1982

Before Honorable Robert H. McWilliams, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

RONALD GENE SOUTH and TERRY LYNN KLINGMAN, Bankrupts,	)	
OTASCO, INC., Plaintiff-Appellee,	)	No. 81-1750
vs.	)	
UNITED STATES OF AMERICA, Defendant-Appellant.	)	

This matter comes on for consideration of appellee's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

By (s) *Robert L. Hoecker*
Robert L. Hoecker
Chief Deputy Clerk

APPENDIX B

[Filed Nov. 4, 1982]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE	)	
RONALD GENE SOUTH,	)	
Debtor,	)	
	)	
OTASCO, INC.,	)	CIV-80-1358-E
Plaintiff-Appellee,	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
Defendant-Appellant.	)	

ORDER

COMES NOW the Court and pursuant to the Tenth Circuit mandate of September 14, 1982, and enters judgment for the Defendant.

It is hereby ORDERED that the opinion, order and judgment of the Honorable David Kline, United States Bankruptcy Judge, dated October 22, 1980, directing the Bankruptcy Court Clerk to return all complaint fees collected from plaintiff is hereby reversed and the filing fees are ordered to be paid by the plaintiff.

Entered this *4th* day of November, 1982.

(s) *Luther B. Eubanks*
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 11-4-82

APPENDIX C

[Filed April 29, 1981]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

In re

RONALD GENE SOUTH, Debtor, Bk-80-00317

OTASCO, INC., Plaintiff, Adversary Nos. 80-0189, 80-0190

v.

UNITED STATES OF AMERICA and RONALD GENE SOUTH, Defendants.

In re

TERRY LYNN KLINGMAN, Debtor, Bk-80-00507

OTASCO, INC., Plaintiff, Adversary Nos. 80-0191, 80-0192

v.

UNITED STATES OF AMERICA and TERRY LYNN KLINGMAN, Defendants.

ORDER

On the 16th day of April, 1981, the above styled causes came on for argument upon the appeal of the United States of America to the Opinion, Order and Judgment of the Honorable David Kline, U. S. Bankruptcy Judge, dated October 22, 1980, directing the Bankruptcy Court Clerk to "return all complaint fees collected from plaintiffs and in all future cases . . . to collect no fee for any pleading whether entitled complaint, application, motion or other-

wise which seeks relief from the automatic stay of Code § 362, to determine dischargeability of particular debts under Code § 523 or to generally object to discharge under Code § 727." The defendant-appellant United States appeared through Nancy R. Sills, and the appellee OTASCO appeared through Andy Coats, G. Blaine Schwabe, III and John C. Williams.

The Appellant, the United States of America, contends that the bankruptcy court erred in so ordering because the $60.00 filing fee required for all *adversary* complaints was duly promulgated pursuant to the authority granted the Judicial Conference, and violates none of the plaintiff's constitutional rights.

After considering counsel's submitted briefs and oral arguments this court is persuaded that the Order and Judgment of the bankruptcy court should be AFFIRMED.

The opinion of the bankruptcy judge (which is reported at 6 BCD 1149, 6 B.R. 645) is adopted as this court's opinion. The following is additionally noted:

The government argues in part that:

> Under the old Bankruptcy Act, the Judicial Conference was empowered to set additional fees to fund the bankruptcy system. 11 U.S.C. § 68(c)(2) [B.A. § 40(c)(2)] and that under the new Bankruptcy Code, section 1930(b) fulfills the same function of funding the bankruptcy system.

This just is not true.

"The bankruptcy system as it existed prior to enactment of Pub.L.No. 95-598 was supposed to be self-financing . . . . The legislative history makes it clear that the bankruptcy courts will be financed from general federal revenues as are the other courts of the federal judiciary." 1 *Collier* (15th Ed.) pp. 3-337, 3-341. ". . . [T]he new statute — quite specifically excludes the possibility of un-

usual charges being made applicable to proceedings under title 11 by restricting the power to impose charges to those which may be prescribed . . . with respect to the district courts. The section is not intended to permit the Conference to require contributions from estates similar to contributions to the Referees' Salary and Expense Fund under current law, which this bill eliminates [H.R. Report No. 595, 95th Cong.]" 1 *Collier* (15th Ed.) p. 3-344.

As emphasized in the legislative history concerning 28 U.S.C. 1930 (H. Rep. No. 95-595, p. 449):

> Subsection (b) permits the Judicial Conference to prescribe additional fees of the kind that the Conference prescribes under the analogous section for the district court, 28 U.S.C. 1914(b). It is not intended to permit the Conference to require contributions from estates similar to contributions to the Referees' Salary and Expense Fund under the current law, which this bill eliminates.

As specifically mentioned by Congressman Don Edwards, the Reform Act's co-sponsor:

> . . . [T]itle II of the House amendment eliminates the Referees' Salary and Expense Fund which was established long ago in an era when the bankruptcy courts were supposed to be self-supporting. The . . . fund has been running a deficit for several years and deleting it serves *to bring the bankruptcy court into line with all other federal courts.*
>
> In order to mitigate the impact on revenues that such a deletion will have . . . [appropriate sections] raise filing fees in a manner that treats bankruptcy cases identical with the federal cases and comports with dollar values appropriate in 1978 for gaining access to a Federal Court. [124 Cong. Rec. H 11108 (daily ed. Sept. 28, 1978)] (Emphasis supplied)

The government's assertion that the "substantial revenues lost by the abolition of the Referees' Salary and Expense Fund and the increase in the cost of court administration led the Judicial Conference to set the fee for filing an adversary complaint at $60" is not fairly inferrable from the record. Moreover, I feel certain the Conference in its action did not have presented to it, or consider, creditor impact under the new Code.

The Judicial Conference on March 7-9, 1979, took action effective October 1, 1979, the Reform Act's effective date, to charge $60.00 for all Code chapter 7 and 13 cases and for "instituting any civil action, suit or proceeding in a controversy over which the bankruptcy court does not have exclusive jurisdiction," that is, those maintainable both in the bankruptcy court under its expanded jurisdiction and in courts of general jurisdiction, thus bringing the bankruptcy court "in line with all other federal courts."

The bankruptcy court recognized and preserved this policy principle in its "Order and Judgment" in directing the clerk to:

> (1) Collect $60.00 from each *party commencing* a case under Code chapters 7 and 13 of title 11 *whether by original process, removal* or *otherwise* (emphasis supplied) but not to collect for any filed pleading . . . which seeks relief from the automatic stay of Code § 362, to determine dischargeability of particular debts under Code § 523 or to generally object to discharge under Code § 727.

Interestingly, the Judicial Conference did not until March 6, 1980, raise the fee to $60.00 "for filing a complaint in a controversy over which the court has *exclusive* jurisdiction," creditor OTASCO's type of action herein.

The court is unimpressed with the argument that "the bankruptcy court's unique procedures and budgetary demands" justify the imposition of a fee upon a person or

entity such as OTASCO who has not voluntarily come into court but has done so in response to an action being instituted against it. The suggestion that *substantive* rights granted creditors under a Code which concededly contains many debtor benefits must not be elliminated or eroded through *procedural* cost barriers has more force. Read Bancroft-Whitney *Bankruptcy Service* "Current Awareness Alert," Issue No. 1, Feb. 1981, p. 6, OBSERVATION.

The government argues that the bankruptcy judge's holding:

> . . . [A]mounts to a finding that it is economically inefficient for appellee to pay the $60 filing fee in light of the small amount of its typical claim. If the holding is carried to its logical conclusion, a party's constitutional right of access to the courts would depend entirely upon the amount of its claim. Thus OTASCO might assert a constitutional right to raise its claim in the South proceeding since the $413.48 claim is close to OTASCO's average three hundred dollar claim. However, since its claim in the Klingman proceeding is over eight hundred dollars (nearly three times OTASCO's average claim), OTASCO might not assert a constitutional right to proceed without paying a filing fee.

The small value of OTASCO's property interests involved herein is not controlling in assessing the impropriety of the challenged fees precluded by the appealed from bankruptcy court's order but the modest amounts herein dramatize *why* any charge distorts "due process." But, the government's analysis even falls short in that the *amount* of the *claim* (or debt) is *not* the critical economic factor in seeking to lift the stay, but the *dollar value* of the *property* sought to be recovered, which often is, and in these cases was *substantially less* than the amount of the debts. Read Code §§ 506(a), 501, 502. Compare Code § 101(4).

Those case decisions which emphasize the acceptability of charging filing fees where the initiating party *voluntarily* seeks access to and aid from a court where alternate relief routes exist are not in point. Here creditor OTASCO was involuntarily and reluctantly placed in a position where it had to either promptly respond in the bankruptcy court or be deprived of valuable substantive property rights, after it had sought, paid for and was using another forum *voluntarily* selected to enforce pre-bankruptcy contractual rights.

Admittedly the Code permits a secured claimant to file a proof of claim without charge but such grants creditor OTASCO no relief. OTASCO stood barred from making any move to lift the stay as to its property [Code § 362(a)] action identical to an application for relief from a District Court temporary restraining order; and OTASCO could not even talk with the debtors concerning such debt. See, in particular, Code § 362(a)(1), (3), (4), (5). Additionally, if it stood moot the right to challenge the dischargeability of its debt [Code § 727(a)] or a portion thereof for conversion [Code § 523(a)(6)] would be lost. See Code § 523(c) which provides that "the debtor shall be discharged from a debt specified in paragraph (2), (4), or (6) . . . unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge . . ." And read Interim Rule 4003 and Bankruptcy Rule 409(a)(2) as to the sharply limited time in which the complaint must be filed.

The court can but note as emphasized by the appellees that "a study of the federal fee system reveals that this is the *only instance* under federal law where a fee must be paid by a person against whom proceedings have been instituted." No fee is properly chargeable as a condition precedent to a person's right to *defend* life, liberty or property in a *forum* having *sole, exclusive jurisdiction.*

Moreover, by no imaginational stretch can fees of the type herein assessed against creditor OTASCO be fairly defined as "additional fees . . . *of the same kind* as the Judicial Conference prescribes under § 1914(b) of this title (as to U. S. District Courts)." (emphasis supplied) They are not identical or even analogous to *any* U. S. District Court charge.

Accordingly,

IT IS HEREBY ORDERED that the appealed from Order and Judgment of the U. S. Bankruptcy Court for the Western District of Oklahoma be AFFIRMED.

ENTERED this *29th* day of April, 1981.

(s) *Luther B. Eubanks*
United States District Judge

ENTERED IN JUDGMENT DOCKET ON Apr 29 1981

APPENDIX D

[Filed Oct. 22, 1980]

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

In re	)	
RONALD GENE SOUTH,	)	Bk-80-00507
Debtor,	)	
OTASCO, INC.,	)	Adversary Nos. 80-0191
Plaintiff,	)	80-0192
v.	)	
	)	
UNITED STATES OF AMERICA	)	
and RONALD GENE SOUTH,	)	
Defendants.	)	
	)	
	)	
In re	)	
TERRY LYNN KLINGMAN,	)	Bk-80-00317
Debtor,	)	
OTASCO, INC.,	)	Adversary Nos. 80-0189
Plaintiff,	)	80-0190
v.	)	
	)	
UNITED STATES OF AMERICA	)	
and TERRY LYNN KLINGMAN,	)	
Defendants.	)	

OPINION

Appearances

John C. Williams, Oklahoma City, Oklahoma for Otasco, Inc.

Nancy Sills, Department of Justice, Washington, D. C. and Paul Richards, Assistant United States Attorney, Oklahoma City, Oklahoma for the United States.

STATEMENT

Voluntary bankruptcy petitions were filed February 25, 1980 and March 21, 1980 wherein the schedules of debtor Ronald Gene South listed Otasco, Inc., (formerly Oklahoma Tire & Supply) an Oklahoma corporation, as an unsecured creditor for $174.04, and debtor Terry Lynn Klingman listed Otasco as a secured creditor for $386.75 on an air conditioner with a market value of $250.00 and a debt of $333.54 on tires with an estimated market value of $300.00.

Because of the automatic stay provisions of 11 U.S.C. §362, Otasco (who at the time had collection suits pending in state court) filed complaints which in essence request a lift of the automatic stay and a return of the goods in which Otasco has security interests or alternatively to declare nondischargeable a portion of the listed debts to the extent of the fair market value of unavailable goods if converted by the debtors.[1]

When filing these complaints June 10, 1980 Otasco's counsel was advised by the clerk of the filing fee increase from $15.00 to $60.00 (resulting from Judicial Conference action, reflected by Administrative Office of the United States Courts' memorandum dated April 10, 1980, received April 24, 1980 by Clerk, U. S. Bankruptcy Court, W.D. Okla.). Otasco paid such fees, filed additional complaints

---

[1] B.R. 703 provides that "an adversary proceeding is commenced by filing a complaint with the court" and B.R. 701 identifies an adversary proceeding to include: ". . . any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property . . . (2) determine the validity, priority, or extent of a lien or other interest in property . . . (4) object to or revoke a discharge . . . (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt." See Title III, Bankruptcy Reform Act, §405(d) making such rules applicable "to the extent not inconsistent" with the new Code and "until such rules are repealed or superseded."

against the United States, questioning the $60.00 fee requirements as statutorily and constitutionally offensive.[2]

Otasco's position is set forth in its District Manager's affidavit:

> "As a result of the objection and complaint filing fee being raised from $15 to $60, Otasco, Inc. has been unduly prejudiced in that the economic considerations involved in paying the increased filing fee inhibit and prejudice Otasco, . . . for the reason that the advancement of $60 filing fee on an indebtedness of from $200 to $500 . . . has and will continue to prohibit and prejudice us from making our objections and complaints . . . We have no other adequate remedy at law . . . and cannot otherwise contact the debtor for the legal prohibition of being in violation of the bankruptcy law . . ."

By agreement the cases have been consolidated. A hearing as to these fees was held August 8, 1980. Otasco offered 13 exhibits (including an affidavit) which were admitted without objection. The United States offered no evidence but entered into certain stipulations. It is agreed that all material, relevant bankruptcy court records in these cases, may be evidentially considered.[3] After oral argument, the matter was taken under advisement with briefs invited.

---

[2] In so doing Otasco by application asked the court to place the filing fees in escrow, trust, or to hold in abeyance until final court determination.

[3] See letter of counsel for Otasco dated October 7, 1980, which also includes:

> "Finally, it is also proffered the following closing argument; that is, Otasco has a store in the Oklahoma City area that sells second-hand products; these products are returned items from the regular Otasco stores which sell new goods; this second-hand outlet also sells all repossessed goods sold by the other Otasco stores, Otasco, as was men-

[APPENDIX]

ISSUES

1) Is the United States as a sovereign immune from this suit?

2) Can Otasco be required to pay these $60.00 filing fees to seek relief from the §362 automatic stay or alternatively to request a determination of nondischargeability of a portion of its debt?

FACTS

Otasco, Inc. (Oklahoma Tire and Supply Co.) sells a variety of merchandise to the public through a chain of retail stores, and as a creditor is involved in some 80 to 100 bankruptcy cases annually. The amounts of indebtedness, usually secured, average about $300.00.

Relevant items sold to debtor South included one .38 caliber special pistol and shells for $95.10 and two steel belted Uniroyal tires for $161.34 with an unpaid balance of $174.04. The Klingmans were sold an air conditioner for $464.88 and four Uniroyal tires for $348.36, with fair market values on date of bankruptcy of some $250.00 and

---

[3] (Continued)

tioned at the hearing, takes a security agreement and UCC-1 financing statement on *all* goods sold on credit. . . . the effect of the filing fee requirement has voided the contract and the taking a security agreement and UCC-1 financing statement at the second-hand store (on numerous items generally consisting of used and repossessed refrigerators, air conditioners, lawn mowers and garden tools, tires and batteries — which under Oklahoma law are items allowed to be replevined and repossessed — and other small and various and sundry items). The majority of these second-hand contracts upon which security agreements and UCC-1 financing statements are taken consist of $50.00 to $150.00 or $200.00 items which, in my client's opinion, is effectively invalidating and make void the contract for the reason that the $60.00 filing fee is not recoverable and exceeds any net recovery that may be made by either a money judgment or an order returning the goods to Otasco."

$200.00, respectively. By sales agreement terms Otasco retained goods ownership and was entitled upon debtor's default to retake possession of the goods and/or institute legal proceedings for the balance due on the debtor's account. On the dates of these bankruptcy petitions, Otasco had state court cases pending against the debtors.

LAW

Sovereign Immunity

The United States as sovereign challenges this court's jurisdiction because it has been sued by Otasco absent consent. Pertinently, the government's brief observes:

> ". . . jurisdiction is lacking over this adversary proceeding. This memorandum addresses the underlying issue, however, since this issue of waiver of fees arises most often by motion in proceedings to which the United States is not a party. In those instances, *the United States often seeks to intervene in order that its interest may be protected. If this adversary proceeding is dismissed for lack of jurisdiction, the United States respectfully requests that it be allowed to express its views if the issue is raised in another manner.*" (emphasis added)

The filing fee issue may well be raisable by motion rather than by complaint. However, there is little magic in a pleading's title; substance determines its character and sufficiency. RUBENSTEIN v. UNITED STATES, 227 F.2d 638 (10th Cir. 1955). Otasco's complaint will be treated as a motion and the United States, as it requested, is granted the right to intervene "and express its view."[4]

---

[4] Since the plaintiff has challenged the actions of public officials on constitutional grounds, the doctrine of sovereign immunity may be inapplicable. As noted in CARTER v. SEAMANS, 411 F.2d 767 (CA 5 1969): "There are, however, two well-recognized instances where suits for specific relief against public officers are not considered to be against

[APPENDIX]

Federal Statutes — Fees

Judicial Conference Action

Title II of the Bankruptcy Reform Act of 1978 amended 28 U.S.C. §1930 to read in part:

> "(a) Notwithstanding section 1915 of this title, *the parties commencing a case under title 11* shall pay to the clerk of the bankruptcy court the following filing fees:
>
> "(1) For a case commenced under chapter 7 or 13 of title 11, $60.[5]
>
> "(b) *The Judicial Conference* of the United States *may prescribe additional fees* in cases under Title 11 *of the same kind* as the Judicial Conference prescribes under section 1914(b) of this title.
>
> "(e) The clerk of the bankruptcy court may collect only the fees prescribed under this section." (emphases added)

Effective October 1, 1978 28 U.S.C. §1914 was amended, increasing the district court $15.00 filing fee requirement as follows:

---

[4] (Continued)
the sovereign. In these two instances the sovereign's consent to be sued is not required and the defense of sovereign immunity is unavailable. Thus, the actions of a public officer can be made the basis of a suit for specific relief against the officer as an individual if, but only if, (1) the officer's action is beyond his statutory powers, or (2) if within those powers, the powers themselves or the manner in which they are exercised are constitutionally void."

[5] Chapters 7 and 13 deal with straight bankruptcy and adjustment of debts of individual with regular income, respectively. Although not relevant, filing fees for chapter 9 — adjustment of debts of a municipality are set at $300, chapter 11 reorganization, $200 and chapter 11 railroad reorganizations, $500. [§1930(a)(2)-(4)]

"(a) The clerk of each district court shall require the *parties instituting any civil action, suit* or *proceeding* in such court, whether by *original process, removal* or *otherwise, to pay a filing fee of $60,* except that an application for a writ of habeas corpus the filing fee shall be $5. (emphasis added)

(b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States. . . ."

Judicial Conference Schedule of Additional Fees *U. S. District Court.*

On March 7-9, 1979 the Judicial Conference revised the schedule of fees to be charged in the United States District Court, effective October 1, 1979 on nominal fees for indexing, filing of letters rogatory, registering of a judgment, searching of records, certifying documents, reproducing instruments, admission of attorneys to practice, etc. [See written notation following §1914, 28 U.S.C.A., Cumulative Pocket parts, p.154]. *U. S. Bankruptcy Court.*

The Conference, pursuant to 28 U.S.C. §1930(b) prescribed, effective October 1, 1979, the following schedule of fees for the United States Bankruptcy Court:

". . . 7. For instituting any civil action, suit or proceeding in a controversy over which the bankruptcy court does not have exclusive jurisdiction, whether by original process, removal or otherwise, $60.00; *for filing a complaint in a controversy over which the court has exclusive jurisdiction, $15.00."*[6] (emphasis added)

---

[6] This Judicial Conference fee schedule attempted to deal with adversary proceedings and distinguish between those civil actions which generally would have been heard by courts of general jurisdiction (state or federal) exampled by real estate foreclosure actions, antitrust suits, negligence and other tort actions, etc. and those actions peculiar and ex-

[APPENDIX]

Effective March 6, 1980, transmitted by Administrative Office memorandum dated April 10, 1980 (received April 24, 1980 by Clerk, U. S. Bankruptcy Court, W.D. Okla.) the Judicial Conference, under the same statutory authority, increased the filing fee for all complaints to $60.00.

Federal Statutes — Bankruptcy Code

Automatic Stay — §362

Upon request, the court may terminate, annul, modify or condition the stay [§362(d)]. Specifically, the court may grant relief from the stay of an act against the property if the debtor in straight liquidation has no equity in the property. Importantly, if the court does not rule within 30 days from the date of the complaint for relief, the stay is automatically terminated [§362(e). Also see Interim Rule 4001].

Debt Dischargeability — §523

A discharge voids all judgments on discharged debts, and enjoins "the commencement or continuation of an action, the employment of process, *or any act*, to collect . . . (emphasis added)" [§524(a)(2)]. This broadens the protection of the former Act and probably precludes telephone calls, letters, or any personal contact. The provision's apparent intent is to insure that once a debt is discharged, the debtor will not be pressured, in any way, to make payment. The court must grant the individual debtor a discharge unless one of nine other exceptions exist [§727(a)]. And creditors holding claims that require complaints to de-

---

[6](Continued)
clusive to the bankruptcy court, such as the ones herein, that is, requests to lift the automatic stay [§362], to determine dischargeability of particular debts [§523] or to generally object to discharge[§727]. Such Conference action also included a listing of various charges corresponding to the United States District Court as to filing notice of appeal, document certification, etc.

termine dischargeability, including willful-malicious conversion of another's property or interest must file complaints within the time set by the court or such debt is discharged.[7]

Federal Decisions — Constitutional Law — Fees

Due Process

Court access.

Filing fees and constitutionality have received studied judicial treatment. Read BODDIE v. CONNECTICUT, 401 U.S. 371 (1971), and UNITED STATES v. KRAS, 409 U.S. 434 (1973). In these cases *indigent* persons claimed that the fee unconstitutionally denied them *court access.* KRAS involved the bankruptcy court under the prior Act. BODDIE dealt with a state divorce court.

Exclusive forum — right to defend — involuntary action.

In BODDIE a six justice majority opinion struck down the state court filing fee as violative of constitutional due process as applied to indigents principally because the would-be plaintiffs *had no other* marriage dissolution *avenue to which to resort* and *were* actually *resorting* to the *judicial process no more voluntarily* "in a realistic sense *than* that of *the defendant called upon to defend his interest in court.* For both groups this process is not only the paramount dispute-settlement technique, but in fact *the only available one.* . . . Early in our jurisprudence, this court voiced the doctrine that '[*w*]*herever one is assailed* in his person or his property, *there he may defend.*' (citing authorities) . . ." [p.377] (emphases added)

---

[7] Debts requiring complaints within a limited period of time include false pretenses, fraud, larceny, embezzlement, and willful and malicious acts, §523(a)(2), (4) and (6). In Oklahoma's Western District, creditors are given notice to file any such complaints within 30 days of the §341 meeting of creditors. See Interim Rules, Official Form No. 13, par. 3-4.

The BODDIE majority continued:

> "Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the court in MULLANE v. CENTRAL HANOVER TR. CO. . . . 'there can be no doubt that *at a minimum* they require that *deprivation* of life, liberty or property by adjudication *be preceded by* notice and *opportunity* for *hearing appropriate to the nature of the case.*'" (emphases added) [p.378]

Non-exclusive forum — voluntary action.

In a five-four decision, the KRAS court refused to apply BODDIE to bankruptcy petitioners; the KRAS majority recalled that BODDIE was based on the rationale that *resort* to the state courts was *not voluntary*, realistically, the *only* available avenue for marriage dissolution, and commented:

> ". . . Kras, alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level (as BODDIE). If Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. [p.445]
>
> * * *
>
> "Resort to the court . . . is not Kras' sole path to relief. Boddie's emphasis on *exclusivity* finds no counterpart in the bankrupt's situation . . ." [p.446] (emphasis added)

Fundamental right.

In 1966 a three judge court struck down an annual $1.75 Texas poll tax on the premise that Due Process Clause constitutional rights would be of little value if they

could be indirectly denied or manipulated out of existence and specifically observed: [8]

> "Since, in general, only those who wish to vote pay the poll tax, the tax as administered by the State is equivalent to a charge or penalty imposed on the exercise of a *fundamental right*. If the tax were increased to a high degree, as it could be if valid, it would result in the destruction of the right to vote. (citing authority)
>
> "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. (citing authority)" (emphasis added)

DISCUSSION

"The Judicial Conference . . . may prescribe additional fees . . . of the same kind. . . ."

A nonbankruptcy case is commenced in district court by the filing of a complaint and the payment of a $60.00 filing fee. Thereafter, all subsequent pleadings including applications, motions, answers, counterclaims, cross-claims or third-party complaints are considered *part* of the original case and no additional or separate filing fee is required. Specifically, for example, Rule 65(b) of the Federal Rules of Civil Procedure provides for the issuance of a temporary restraining order without notice to an opposing party under certain circumstances. Such Rule 65 additionally reads that "[o]n 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends

---

[8] UNITED STATES v. STATE OF TEXAS, 252 F.Supp. 234, 254 (WD Tex. 1966).

of justice require." No filing fee is required by either 28 U.S.C. §1914, or the Judicial Conference's additional fee schedule pursuant thereto, to dissolve or modify such temporary restraining order.

A bankruptcy case is commenced by a debtor (voluntary cases) or creditor (involuntary cases) filing a bankruptcy petition and paying the required $60.00 filing fee. This filing grants the bankruptcy court essentially exclusive-jurisdiction over all matters regarding the debtor-creditor relationship. Immediately and automatically virtually all creditors' actions to collect their debts and pursue and protect delinquent security interests or mortgages are stayed.[9]

Where a creditor wishes to have the automatic stay lifted presently effective Bankruptcy Rule 701(6) when considered with Bankruptcy Rule 703 calls for proceeding by complaint and the schedule of fees set by Judicial Conference action dated March 6, 1980 calls for an additional $60.00 fee from each creditor filing such complaint.

Thus, where a party moving to lift a temporary restraining order in a pending district court may do so without payment of a fee, incongruously a bankruptcy court creditor must pay a $60.00 filing fee in seeking to lift the automatic stay.

Access to Court

The government in its brief urges:

> ". . . Under the Bankruptcy Reform Act of 1978, 28 U.S.C. §1930(b) now authorizes the Judicial Conference to set fees in addition to those specified by

[9] Read Code §362. At the same time administrative procedures martial the debtor's non-exempt assets, pointed toward creditor distribution. Dividends, if any, are distributed to the creditors with all remaining amounts owed discharged except those debts which come within specific statutory exceptions [§523].

statute. The legislative history demonstrates an intent that fees in bankruptcy keep pace with those in the federal district court:

'In order to mitigate the impact on revenues that such a deletion [of the Referee's Salary and Expense Fund] will have, sections 244 and 246 of title II of the House Amendment raise filing fees in a manner that treats bankruptcy cases identical with other Federal court cases and comports with dollar values appropriate in 1978 *for gaining access to a Federal court.*' "[10] (emphasis added)

This rationale applies to cases commenced by a petition in bankruptcy and was met when both straight bankruptcy and district court filing fees were set at $60.00, but should not be unrealistically expanded to include *all* creditor action taken within the definition of adversary proceedings set forth in the 1973 Bankruptcy Rules promulgated under the former Act.

By initiating a voluntary chapter 7 bankruptcy case, an individual debtor, conditioned upon making available for creditor dividends all non-exempt assets, if any, affirmatively seeks all rights and remedies provided by substantive bankruptcy law which include the discharging of all nondischargeable debts. Although properly perfected security interests in personalty and valid mortgages and liens on realty are neither affected nor extinguished by substantive Code law, the broad and automatic stay effect bars all foreclosure as well as collection efforts, harassment, etc.

The government suggests that the bankruptcy system should "be paid for by those who use it," quoting language from KRAS, supra. Significantly the court in KRAS was speaking of the filing fee required of persons filing volun-

---

[10] 124 Cong. Rec. H 11089 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News, Vol. 5 at 6485 (Statement of Rep. Don Edwards). Section 246(a) became 28 U.S.C. §1930.

tary petitions in bankruptcy and in essence was saying that the bankruptcy system should be paid for by those who *choose* to use it. Here, Otasco did not choose to be involved in bankruptcy proceedings. It became involved when and only when the debtor chose to invoke bankruptcy law remedies against Otasco. It is constitutionally suspect to urge that the bankruptcy system should be paid for by those against whom it is used.

Exclusive forum — right to defend

KRAS, although definitive of the rights of a petitioning bankruptcy debtor, affords no analogy to a creditor, the object of a voluntary petition. Such creditor is immediately faced with decisions of note. Inaction will result in collateral jeopardy and debt extinction. The automatic stay restricts all remedies, legal and equitable, exclusively to the bankruptcy court. *There is no other forum.* The secured claimant can take no steps to protect his security or mortgage interest absent express bankruptcy court authority and action. Crucially where the creditor chooses to defend and protect such rights he must pay a substantial, unrecoverable filing fee. "Property" of value, has been taken. As exampled in these cases, the $60.00 filing fee approaches economically precluding a creditor from exercising his rights. Court access is clogged if not totally barred. The *substantive* law of bankruptcy identifies, acknowledges and protects such right. Ironically, such right is burdened to the point of burial by a *procedural* barnacle.

KRAS upheld the filing fee requirement for bankruptcy petitions notwithstanding petitioner indigency. Interestingly, Otasco claims no indigency and disclaims any interest in instituting bankruptcy proceedings.[11] Otasco

[11]Distinguish but compare HAREWOOD v. THE SARAH ALLEN HOME FOR THE AGED, INC., ... BCD ....., 4 B.R. 724 (ED Pa. 6/20/80) wherein the court held that an indigent creditor could proceed by complaint *in forma pauperis.*

simply urges that when these bankruptcy petitions were filed, such effectively initiated actions against it and when it as a creditor filed a "complaint" seeking to lift the automatic stay or request a determination of partial nondischargeability of debt, it is merely *defending* an action brought by another. Basic ability to pay is not in issue but whether the *fundamental right to defend* a recognized interest can be made subject to any price, or at least one which as in this instance approaches interest confiscation.

Like the right to vote, the *right to defend* may well be a *fundamental* constitutional right which cannot be made subject to a tax which essentially confiscates a defendant's property or portion thereof before hearing. Such suggestion offends the most elementary due process principles of American jurisprudence.[12]

CONCLUSION

The Judicial Conference is empowered to prescribe "additional fees in cases under title 11 *of the same kind* as prescribed under section 1914(b)" of title 28. There is no fee prescribed under section 1914(b) comparable to the $60.00 fee for "filing a complaint" in a pending title 11 bankruptcy case.

Apart from the fee-setting statute's parameters a taxing of Otasco of $60.00 to come in and defend, under the facts herein, deprives Otasco of property without "opportunity for hearing appropriate to the nature of the case."

---

[12]Otasco's counsel argued in part: "I'm saying that the sixty dollar filing fee is not warranted. . . . But, the practicality of the matter is that Otasco, before, the fifteen dollars is quite feasible to chase and try to enforce their three hundred dollar average claim. With sixty it is not. I have asked in my petition that there may be no authority for even the fifteen dollar fee. . . . I directly agree . . . that Otasco is a corporate person who has funds. They are not indigent and they can pay filing fees . . ."

Otasco's position is not that of a party *voluntarily seeking to gain access* to a federal court to institute a civil action, suit or proceeding "by original process, removal or otherwise." Moreover, Otasco has no other forum. BODDIE v. CONNECTICUT, supra, at 378.[13]

The clerk of this court, by an accompanying separate order and judgment, is directed to return all complaint fees collected from Otasco and is further instructed in all future cases in this district to collect $60.00 from each party commencing a case under chapter 7 or 13 of title 11 "whether by original process, removal or otherwise" but to collect no fee for any pleading whether entitled complaint, application, motion or otherwise which seeks relief from the automatic stay of Code §362, to determine dischargeability of particular debts under Code §523 or to generally object to discharge under Code §727.

In sum, a creditor in a defending posture in the bankruptcy court should not and cannot be burdened with a

---

[13]The judicial philosophy of one bankruptcy trial judge has slight, if any, relevance and thus is being footnoted:

> Never has it seemed more difficult for all to make future financial plans. Yet the law has a role to play and it like all other tools must effectively respond or pass from the scene. The recently enacted new Code grants hope at a time when sorely needed. The U. S. Bankruptcy Court may be destined to become the most significant civil trial forum in America insofar as dollars controlled and numbers of persons affected are concerned. The Reform Act comes on the scene at a time when our entire economic system is being challenged. An effective, practical administration of this Code both in *liquidation and rehabilitation* may enable the system to bend rather than break. Where asserted economic rights of various parties in interest come into irreconcilable conflict, this court is the *sole forum* where *all* such rights and differences can be adjusted.
>
> *Liquidation* deals with a gathering of assets, an equitable distributing thereof, and the granting to the debtor a "fresh start". For the hopelessly overburdened and disadvantaged, this policy to relieve the hon-

$60.00 responsive pleading fee any more than a civil defendant in the district court. Such offends the Code, the Constitution and common sense.

Dated at Oklahoma City, October 22, 1980.

(s) *David Kline*
DAVID KLINE

U. S. Bankruptcy Judge

---

[13] (Continued)

est, debt-ridden debtor could not be more legitimate. *But*, those substantive rights granted to creditors must be sensitively preserved by the procedural merchanisims. For the judicial system (and the bankruptcy court in particular) to retain public support and acceptance, the rights of all parties must be dealt with in an *even-handed* manner. The continuing duty to see that justice is done means *justice* for the debtor, the trustee, the secured claimant and the unsecured claimant,— so that *each* gets that to which he is entitled — no more — no less.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
For the Western District of Oklahoma

ORDER FOR MEETING OF CREDITORS AND FIXING TIMES FOR FILING OBJECTIONS TO DISCHARGE AND FOR FILING COMPLAINTS TO DETERMINE DISCHARGEABILITY OF CERTAIN DEBTS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

To the debtor*, the creditors of debtor, and other parties in interest:

An order for relief under 11 U.S.C. chapter 7 having been entered on a petition filed by (or against) the following:

BK#80-00317, RONALD GENE SOUTH, SS#442-54-7364, 220 S.E. 19th, Okla. City, Oklahoma 73129, Filed February 25, 1980

* * *

IT IS ORDERED, AND NOTICE IS HEREBY GIVEN, that:

1. A meeting of creditors pursuant to 11 U.S.C. Section 341 (a) shall be held at the Bankruptcy Court, 7th fl., Rm. 721, Post Office Bldg., 201 Dean A. McGee Avenue, Okla. City, Oklahoma at 9:00 o'clock a.m. on April 7, 1980

2. The debtor shall appear in person (or, if the debtor is a partnership, by a general partner, or, if the debtor is a corporation, by its president or other executive officer) at that time and place for the purpose of being examined.

3. (If the debtor is an individual) May 12, 1980 is fixed as the last day for the filing of objections to the discharge of the debtor.

4. (If the debtor is an individual) May 12, 1980 is fixed as the last day for the filing of a complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. Section 523 (c).

[APPENDIX]

You are further notified that:

The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

At the meeting the creditors may file their claims, elect a trustee as permitted by law, (if appropriate) designate a person to preside at the meeting, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting.

As a result of the filing of the petition, certain acts and proceeding against the debtor and the property of the debtor are stayed as provided in 11 U.S.C. Section 362 (a).

(If the debtor is an individual) If no objection to the discharge of the debtor is filed on or before the last day fixed therefor as stated in subparagraph 3 above, the debtor will be granted a discharge. If no complaint to determine the dischargeability of a debt under clause (2), (4), or (6) of 11 U.S.C. Section 523 (a) is filed within the time fixed therefor as stated in subparagraph 4 above, the debt may be discharged.

It appears from the schedules of the debtor that there are no assets from which any dividend can be paid to creditors. It is unnecessary for any creditor to file a claim at this time in order to share in any distribution from the estate. If it subsequently appears that there are assets from which a dividend may be paid, creditors will be so notified and given an opportunity to file their claims.

Unless the court extends the time, any objection to the debtor's claim of exempt property (Schedule B-4) must be filed within 15 days after the above date set for the meeting of creditors.

GUILFORD J. HAGMANN of**
615 N.E. 18th
Okla. City, Oklahoma 73105

has been appointed interim trustee of the estate of the above-named debtor.

dated: March 10, 1980 BY THE COURT

ROBERT L. BERRY
United States Bankruptcy Judge

---

*Include here all names used by Debtor within last 6 years

**State post-office address.

ORDER FOR DISCHARGE HEARING COMBINED WITH NOTICE THEREOF

To the debtors set forth in the attached Order for Meeting of Creditors, their creditors, and other parties in interest:

IT IS ORDERED AND NOTICE IS HEREBY GIVEN, that:

1. Discharge hearing pursuant to 11 U.S.C. §524(d) shall be held at the Bankruptcy Courtroom, 9th floor, Post Office Bldg., 201 Dean A. McGee Avenue, Okla. City, Oklahoma

at 10:00 o'clock a.m. on May 28, 1980

2. Motions for approval of agreements of the kind specified in 11 U.S.C. §524(c) [reaffirmation] must be filed at or prior to said hearing, and will be heard and determined at said hearing;

3. Motions concerning Redemption under 11 U.S.C. §722 must be filed at or prior to said hearing and will be heard at the same time and place;

4. Parties filing Motions under 11 U.S.C. §524(c) and 11 U.S.C. §722 as hereinabove set forth must notify the court at least three (3) working days prior to the discharge

hearing that such a motion will be filed and will then be placed on the court's calendar for that date;

5. Complaints to Avoid Liens under §522(f) will be scheduled for trial or pre-trial upon filing of the complaint;

6. The debtors shall appear, with their attorneys of record, at the time and place hereinabove set forth.

DATED: March 10, 1980 BY THE COURT

ROBERT L. BERRY
United States Bankruptcy Judge

APPENDIX F

UNITED STATES BANKRUPTCY COURT
For the Western District of Oklahoma

ORDER FOR MEETING OF CREDITORS AND FIXING TIMES FOR FILING OBJECTIONS TO DISCHARGE AND FOR FILING COMPLAINTS TO DETERMINE DISCHARGEABILITY OF CERTAIN DEBTS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

To the debtor*, the creditors of debtor, and other parties in interest:

An order for relief under 11 U.S.C. chapter 7 having been entered on a petition filed by (or against) the following:

* * *

BK#80-00507, TERRY LYNN KLINGMAN, SS#446-60-0868, 4603 N. Redmond, Bethany, Oklahoma, Filed 3/21/80

* * *

IT IS ORDERED, AND NOTICE IS HEREBY GIVEN, that:

1. A meeting of creditors pursuant to 11 U.S.C. Section 341 (a) shall be held at the Bankruptcy Court, 7th fl., Rm. 721, Post Office Bldg., 201 Dean A. McGee Avenue, Oklahoma City, Oklahoma at 3:00 o'clock p.m. on April 21, 1980

2. The debtor shall appear in person (or, if the debtor is a partnership, by a general partner, or, if the debtor is a corporation, by its president or other executive officer) at that time and place for the purpose of being examined.

3. (If the debtor is an individual) May 27, 1980 is fixed as the last day for the filing of objections to the discharge of the debtor.

4. (If the debtor is an individual) May 27, 1980 is fixed as the last day for the filing of a complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. Section 523 (c).

You are further notified that:

The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

At the meeting the creditors may file their claims, elect a trustee as permitted by law, (if appropriate) designate a person to preside at the meeting, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting.

As a result of the filing of the petition, certain acts and proceeding against the debtor and the property of the debtor are stayed as provided in 11 U.S.C. Section 362 (a).

(If the debtor is an individual) If no objection to the discharge of the debtor is filed on or before the last day fixed therefor as stated in subparagraph 3 above, the debtor will be granted a discharge. If no complaint to determine the dischargeability of a debt under clause (2), (4), or (6) of 11 U.S.C. Section 523 (a) is filed within the time fixed therefor as stated in subparagraph 4 above, the debt may be discharged.

It appears from the schedules of the debtor that there are no assets from which any dividend can be paid to creditors. It is unnecessary for any creditor to file a claim at this time in order to share in any distribution from the estate. If it subsequently appears that there are assets from which a dividend may be paid, creditors will be so notified and given an opportunity to file their claims.

Unless the court extends the time, any objection to the debtor's claim of exempt property (Schedule B-4) must be filed within 15 days after the above date set for the meeting of creditors.

JOHN H. PORTER of** 7904 N.W. 28th Terrace
Bethany, Oklahoma 73008

has been appointed interim trustee of the estate of the above-named debtor.

Dated: April 4, 1980 BY THE COURT

ROBERT L. BERRY
United States Bankruptcy Judge

---

*Include here all names used by Debtor within last 6 years
**State post-office address.

ORDER FOR DISCHARGE HEARING COMBINED WITH NOTICE THEREOF

To the debtors set forth in the attached Order for Meeting of Creditors, their creditors, and other parties in interest:

IT IS ORDERED AND NOTICE IS HEREBY GIVEN, that:

1. Discharge hearing pursuant to 11 U.S.C. §524(d) shall be held at the Bankruptcy Courtroom, 9th floor, Post Office Bldg., 201 Dean A. McGee Avenue, Okla. City, Oklahoma

at 10:00 o'clock a.m. on June 9, 1980

2. Motions for approval of agreements of the kind specified in 11 U.S.C. §524(c) [reaffirmation] must be filed at or prior to said hearing, and will be heard and determined at said hearing;

3. Motions concerning Redemption under 11 U.S.C. §722 must be filed at or prior to said hearing and will be heard at the same time and place;

4. Parties filing Motions under 11 U.S.C. §524(c) and 11 U.S.C. §722 as hereinabove set forth must notify the court at least three (3) working days prior to the discharge

hearing that such a motion will be filed and will then be placed on the court's calendar for that date;

5. Complaints to Avoid Liens under §522(f) will be scheduled for trial or pre-trial upon filing of the complaint;

6. The debtors shall appear, with their attorneys of record, at the time and place hereinabove set forth.

DATED: April 4, 1980 BY THE COURT

ROBERT L. BERRY
United States Bankruptcy Judge

APPENDIX G

COMPARISON OF BANKRUPTCY ACCOUNT CHARGE OFFS

(Compiled from PCO Lists)

1981

District Manager	# of Chap. 7 Accts	$ Amt	# of Chap 13 Accts	$ Amt	Tot. of Bankrpt Accts	Total $ Amt
Holt	18	7,744	—	—	18	7,744
Marlatt	21	5,323	2	622	23	5,945
Moran	14	3,355	—	—	14	3,355
Payne	16	3,836	3	1,151	19	4,987
Wilkie	27	11,577	12	4,841	39	16,418
Davis	11	2,791	1	146	12	2,937
Keene	27	7,621	8	2,430	35	10,051
Region 1	134	42,247	26	9,190	160	51,437
Evans, J.	17	4,200	20	8,361	37	12,561
Partney	35	11,806	44	13,177	79	24,983
Horton	3	748	3	943	6	1,691
Archer	11	2,448	1	415	12	2,863
Region 2	66	19,202	68	22,896	134	42,098
Brannon	15	5,630	90	30,096	105	35,726
Young	28	7,679	30	8,259	58	15,938
Wreyford	15	2,639	6	1,563	21	4,202
Rakes	6	1,295	24	7,270	30	8,565
Region 3	64	17,243	150	47,188	214	64,131
Harris	1	8	7	2,817	8	2,825
Henderson	18	4,680	131	36,623	149	41,303
Headley	30	12,747	39	15,329	69	28,076
Skipper	15	3,237	96	22,973	111	26,210
Stewart	11	3,937	30	5,768	41	9,705
Region 4	75	24,609	303	83,510	378	108,119
Grand Tot.	339	103,301	547	162,784	886	266,085

1980

District Manager	# of Chap. 7 Accts	$ Amt	# of Chap 13 Accts	$ Amt	Tot. of Bankrpt Accts	Total $ Amt
Holt	19	4,794	4	1,217	23	6,011
Marlatt	39	11,522	5	1,790	44	13,312
Moran	21	10,859	—	—	21	10,859
Payne	28	9,854	2	621	30	10,475
Wilkie	17	6,805	4	1,429	21	8,234
Davis	9	3,927	2	590	11	4,517
Keene	16	5,141	12	4,981	28	10,122
Region 1	149	52,902	29	10,628	178	63,530
Evans, J.	11	2,394	10	3,870	21	6,264
Partney	9	1,465	34	13,282	43	14,747
Horton	—	—	2	346	2	346
Archer	5	1,569	2	850	7	2,419
Region 2	25	5,428	48	18,348	73	23,776
Brannon	1	133	90	43,603	91	43,736
Young	9	3,005	32	10,213	41	13,218
Wreyford	17	4,902	4	1,262	21	6,164
Rakes	6	647	17	5,228	23	5,875
Region 3	33	8,687	143	60,306	176	68,993
Harris	4	1,363	7	1,904	11	3,267
Henderson	21	5,581	22	7,651	43	13,232
Headley	6	1,344	11	5,583	17	6,927
Skipper	8	2,954	33	12,158	41	15,112
Stewart	—	—	—	—	—	—
Region 4	39	11,242	73	27,296	112	38,538
Grand Tot.	246	78,259	293	116,578	539	194,837

1979

District Manager	# of Chap. 7 Accts	$ Amt	# of Chap 13 Accts	$ Amt	Tot. of Bankrpt Accts	Total $ Amt
Holt	8	3,894	—	—	8	3,894
Marlatt	9	2,147	1	302	10	2,449
Moran	8	1,279	—	—	8	1,279
Payne	2	927	—	—	2	927
Wilkie	—	—	—	—	—	—
Davis	4	1,455	—	—	4	1,455
Keene	7	1,732	4	1,597	11	3,329
Region 1	38	11,434	5	1,899	43	13,333
Evans, J.	8	2,401	4	1,615	12	4,016
Partney	1	323	3	1,477	4	1,800
Horton	1	215	1	1,300	2	1,515
Archer	1	337	—	—	1	337
Region 2	11	3,276	8	4,392	19	7,668
Brannon	—	—	50	18,534	50	18,534
Young	7	2,321	—	—	7	2,321
Wreyford	13	5,137	1	399	14	5,536
Rakes	3	2,068	14	4,411	17	6,479
Region 3	23	9,526	65	23,344	88	32,870
Harris	3	915	7	1,581	10	2,496
Henderson	8	2,000	14	3,995	22	5,995
Headley	7	1,797	4	739	11	2,536
Skipper	3	1,383	17	5,189	20	6,572
Stewart	—	—	—	—	—	—
Region 4	21	6,095	42	11,504	63	17,599
Grand Tot.	93	30,331	120	41,139	213	71,470

No. 82-1155

In the Supreme Court of the United States

OCTOBER TERM, 1982

OTASCO, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1155

OTASCO, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the requirement adopted by the Judicial Conference of the United States, pursuant to 28 U.S.C. (Supp. V) 1930(b), that creditors who initiate adversary bankruptcy proceedings pay a $60 filing fee violates the Due Process Clause of the Fifth Amendment.

1. Petitioner is a financially solvent corporation that operates a chain of retail stores in Oklahoma. Petitioner sold automobile tires and certain other goods to Ronald Gene South and Terry Lyn Klingman ("the debtors") on credit, with petitioner retaining a security interest in the goods. See Pet. App. 2a; Pet. 4 & n.2. The debtors subsequently defaulted, and petitioner instituted proceedings in state court for personal judgments against the debtors and repossession of the goods (Pet. App. 2a). While these proceedings were pending, the debtors filed voluntary bankruptcy petitions in the United States Bankruptcy Court for

the Western District of Oklahoma, naming petitioner as a creditor (*ibid.*). Pursuant to Section 362 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 362, petitioner's state court proceedings consequently were stayed automatically, along with any other action that would affect or interfere with the property of the debtor or of the bankrupt estate (Pet. App. 2a). Petitioner then instituted adversary proceedings against the debtors by filing complaints in the bankruptcy court seeking relief from the automatic stay and objecting to discharge of the debts (*ibid.*). See Bankr. R. 703.

To file each of these complaints, petitioner was required to pay a $60 filing fee prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. (Supp. V) 1930(b). Petitioner filed a motion asserting that payment of the fees was unconstitutional, and the fees were placed with the court clerk "in escrow" pending the resolution of the challenge to the fee (Pet. 13 n.21).

2. After allowing the United States to intervene to defend the legality of the filing fee, the bankruptcy court held that the filing fee requirement violates the Due Process Clause of the Fifth Amendment (Pet. App. 1d-17d).[1] Relying primarily on *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), the bankruptcy court held that the fee is unconstitutional because it interferes with a creditor's access to an exclusive forum (Pet. App. 14d-16d) and burdens a creditor's "*fundamental right to defend* a recognized interest" in property (*id.* at 15d; emphasis in original). The district court affirmed (Pet. App. 1c-7c), holding that "[n]o fee is properly chargeable as a condition precedent to a person's right to

---

[1]The court also held that the Judicial Conference exceeded its statutory authority in prescribing the $60 fee (Pet. App. 15d). On appeal, however, petitioner conceded the existence of statutory authority for the fee, and that authority is not in issue here. See Pet. App. 2a n.1.

defend life, liberty or property in a *forum* having *sole, exclusive jurisdiction*" (*id.* at 6c; emphasis in original).

The court of appeals reversed (Pet. App. 1a-9a). The court held that, whether or not petitioner is characterized as a defendant, due process does not require that its access to bankruptcy proceedings be free from the burden of a fee requirement (*id.* at 4a). Rather, the court explained (*id.* at 5a): "The constitutionality of the filing fee * * * turns on whether the fee 'unduly' burdens [petitioner's] access to the judicial process, which in turn is determined by balancing the interest [petitioner] seeks to assert in court against the government's interest in exacting the fee." The court stated that petitioner's "contractual rights of immediate possession, immediate payment in full, and personal recourse against the debtor * * * [do not] touch on fundamental interests" (*id.* at 5a-6a) and had to be balanced against the legitimate government interests underlying the fee. The court concluded (*id.* at 6a): "In the face of [petitioner's] ability to pay the fee, the nonfundamental nature of [petitioner's] interest, and the government's legitimate interest in levying the fee, we cannot say that the fee requirement unduly burdens [petitioner's] access to the judicial process."

3. Petitioner's contention (Pet. 13-19) that the filing fee requirement violates the Fifth Amendment was correctly rejected by the court of appeals and does not warrant review by this Court. Petitioner asserts (Pet. 14-15) that "[c]onditioning the right to defend one's property rights upon the payment of a fee is constitutionally impermissible * * *." First, the underlying premise of this contention is false. Petitioner is not a defendant. It is a creditor whose interest is affected by petitions for bankruptcy filed by two debtors. As the court of appeals stated (Pet. App. 4a), petitioner was not required to institute an adversary proceeding, thus incurring the $60 filing fee, in order to protect its security interest. Alternatively, it could have filed a "proof of claim"

without paying a fee. See 11 U.S.C. (Supp. V) 501-502. This would have entitled petitioner to an adjudication of its rights, although it would not have provided for lifting the stay. It may be that the institution of an adversary proceeding provided important practical advantages to petitioner as opposed to the proof of claim procedure, but it is nevertheless true that petitioner cannot properly be characterized as a "defendant" who *must* pay a fee to protect its interest. If anything, petitioner's institution of an adversary proceeding is best analogized to the filing of a complaint by a *plaintiff* in district court. Petitioner is in no different position from any person who, finding that his interest may be adversely affected by a legal action, determines that the most effective strategy is to take the offensive and institute a proceeding, which almost invariably would require the payment of a filing fee.

In any event, even if petitioner's situation is more analogous to that of a defendant than a plaintiff, the court of appeals correctly held that due process does not prohibit the imposition of a fee for filing an adversary proceeding complaint. Petitioner relies (Pet. 15) on *Burns* v. *Ohio*, 360 U.S. 252 (1959), and *Smith* v. *Bennett*, 365 U.S. 708 (1961), for the proposition that "[t]he government may not impose a fee or tax as a prerequisite to the right to defend." But these two cases involved the imposition of fees on *indigent* persons in situations where the fees precluded them from filing an appeal in a criminal case or a writ of habeas corpus. Obviously, the due process concerns involved in those cases have no application to the situation of petitioner, which is a solvent corporation (see Pet. App. 6a) simply faced with the question whether the filing of an adversary proceeding is worth the cost of litigation — including a $60 filing fee.[2]

---

[2]Indeed, in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), where the Court held that an indigent has the right to be provided a transcript in order to appeal his conviction, the Court never suggested that it would be unconstitutional to impose the transcript fee on non-indigent defendants.

Petitioner's reliance (Pet. 15-18) on *Boddie* v. *Connecticut, supra*, is also misplaced. In *Boddie*, the Court invalidated a state court filing fee required of indigent persons seeking a divorce. Because this case does not involve indigents, there is no question here of the filing fee precluding access to the courts, which was a critical factor in *Boddie*. See 401 U.S. at 382. Moreover, petitioner's contractual rights have far less constitutional significance than the fundamental interest of the *Boddie* appellants in obtaining a divorce. Even in cases involving indigents, the Court has upheld filing fee requirements where the interests involved did not rise to the level of the interest involved in *Boddie*. In *United States* v. *Kras*, 409 U.S. 434 (1973), the Court upheld the imposition of a fee upon indigents as a condition on receipt of a discharge in bankruptcy, specifically distinguishing *Boddie* on the basis of the nature of the interest involved. See 409 U.S. at 446. And in *Ortwein* v. *Schwab*, 410 U.S. 656 (1973), the Court upheld a filing fee for obtaining appellate court review of an agency determination reducing welfare benefits. See also *Ross* v. *Brown Title Corp.*, 356 F. Supp. 595 (E.D. La.), aff'd, 412 U.S. 934 (1973) (upholding state requirement that defendants in a foreclosure action post security prior to resisting foreclosure).

Thus, the court of appeals correctly held (Pet. App. 5a) that *Boddie* "did not hold that a defendant's access to court can never be burdened." Rather, the Court in *Boddie* utilized a balancing test and found a due process violation because of "the absence of a sufficient countervailing justification" for the State's rule that effectively denied access to divorce court to indigents. See 401 U.S. at 380-381; Pet. App. 5a. Here, the court of appeals plainly was correct in holding that, weighing the government interests involved in establishing filing fees against the burden on a solvent corporation of paying a small fee to initiate an adversary proceeding, the fee does not violate due process.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1983

DOJ-1983-03